81-2386

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

• • • • • • • •

PHILIP DEL COSTELLO,
Petitioner

vs.

International Brotherhood of Teamsters, et. al.
Respondent

• • • • • • • •

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PARTIES APPEARING BEFORE THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

* * * * *

Petitioner, Philip DelCostello, was the Plaintiff before the United States District Court for the District of Maryland and Appellant before the Court of Appeals for the Fourth Circuit.

Anchor Motor Freight, Inc., was one of the Defendants in the District Court. The other Defendants were Local 557, International Brotherhood of Teamsters, and International Brotherhood of Teamsters.

On appeal before the Circuit Court, Defendant Employer and Defendant Local were Appellees.

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

PHILIP DELCOSTELLO

Petitioner

Vs.

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, ET AL.

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioner, Philip DelCostello, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit.

QUESTIONS PRESENTED FOR REVIEW

* * * *

(1) Is the state arbitral limitations period explicated in United Parcel Service vs. Mitchell, 101 S.Ct. 1559 (1981) applicable to both the Company and the Union when a fair representation suit is filed against both of them?

(2) Should the limitations period for bringing fair representation suits be borrowed from the National Labor Relations Act rather than state statutes for vacating arbitration awards?

(3) Assume Arguendo, that federal statutes are not the appropriate limitations periods, should this Court's Decision in United Parcel Service vs. Mitchell 101 S. Ct. 1559 (1981) be given prospective or retrospective effect?

OPINIONS BELOW

* * * *

The Opinion of the United States Court of Appeals for the Fourth Circuit is unreported and unpublished. Judgment was entered on April 19, 1982.

The initial Judgment rendered in the United States District Court occurred on March 17, 1981, pursuant to an Opinion rendered by the Honorable Shirley B. Jones denying Motions for Summary Judgment. The Opinion was reported and published at 510 F.Supp 724 (1981). Subsequently, Summary Judgment was granted on Motions for Reconsideration following this Court's Decision in United Parcel Service vs. Mitchell, Supra 101 S. Ct. 1559 (1981) in an Opinion reported and published at 524 F.Supp., 721 (1981).

JURISDICTION

* * *

This Court's Jurisdiction is invoked under 28 USC § 1254(1).

STATEMENT OF THE CASE

* * * *

Petitioner was discharged by Respondent Anchor Motor Freight on June 27, 1977, for his refusal to drive a truck which Petitioner contended was unsafe. On July 19, 1977, an Arbitration hearing was held in Atlantic City, New Jersey, before the Eastern Conference Joint Automobile Transporters Conference attended by Union and Company representatives who denied Petitioner's grievance. However, Petitioner was informed by his Union representative Arthur C. Morningstar by way of a written letter on August 19, 1977, that the Arbitration Award would not become final until September 20, 1977, when the Eastern Conference Joint Automobile Transporters Conference would meet to approve the Minutes and if Petitioner wanted to submit any corrections, deletions, or additions of the Minutes of the Arbitration Award, he must do so within 30 days. Otherwise, the Award would be final as is. Petitioner, knowing that Morningstar also served on the Eastern Conference Joint Automobile Transporters Conference, complied with this request in writing on September 14, 1977, specifically outlining that excludible and fraudulent hearsay testimony which constituted the only evidence adduced by

the company was used against him. The petitioner's statement in his September 14, 1977, letter was sufficient under the Eastern Conference rules to require a re-hearing which should have been granted in September, 1977. The failure of the Union and the Company to correspond to this letter as alleged in petitioner's affidavit before the District Court impelled the District Court to conclude the Company and the Union were estopped from claiming that the arbitral limitations period ran until December, 1977.

Petitioner filed a complaint with the National Labor Relations Board against his employer which was not heard because of the pending arbitration.

Petitioner, in compliance with this Court's decision in Auto Workers vs. Hoosier Cardinal 383 U.S. 696 (1966) instituted suit some 88 days after his apparent rejection by the Business Agent on March 16, 1978. Petitioner sued Anchor Motor Freight, Inc., the International Brotherhood of Teamsters, and Local 557 of the International Brotherhood of Teamsters, contending the

employer and Local Union violated § 301 of the Labor Management Relations Act of 1947 as amended, 29 USC § 185, by violating the duty of fair representation as well as the Collective Bargaining Agreement then in force.

The Defendants moved for Summary Judgment although Local 557 and the International failed to raise limitations as affirmative defenses in their answers. The International never raised the limitations defense in its Motion for Summary Judgment and Summary Judgment was granted in its favor of March 17, 1981, on other grounds.

However, the District Court, in her Published Opinion of March 17, 1981, denied Summary Judgment based on limitations to both Defendants, holding the action was brought in a timely fashion under the Maryland Contract Statute of Limitations. After This Court's Decision in United Parcel Service vs. Mitchell, both remaining Respondents renewed their Motions for Summary Judgment on May 5, 1981. On October 27, 1981, the District Court granted the Motions for Summary Judgment holding the limitations period began to run in December, 1977, and

applied the Maryland thirty-day statute for vacating awards [a] as to both the Company and Local Union and found the action to be timebarred since it was filed in March, 1978, and not January, 1978. The Fourth Circuit in affirming in an Unpublished Opinion held:

> "We think that the District Court was correct in its conclusion, and we affirm on the basis of its Memorandum and Order."

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[a] Maryland Courts and Judicial Proceedings Article, § 3-224.

I. REASONS FOR ALLOWANCE OF THE WRIT

INTRODUCTION

* * * * *

This Court, it is submitted should resolve the substantial conflict among the Circuit[1] and District Courts[2] as to whether its Decision in United Parcel Service vs. Mitchell 101 S. Ct. 1559 (1981) and its determination concerning limitations should be applied to both Company and Union when a 301 - fair representation suit is filed against both of them.

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[1] Mitchell, Supra, is not applicable to the Union, according to the following Circuits. Flowers vs. Steelworkers Local 2026, 671 F2d 87 (Second Circuit 1982). Sear vs. Cadillac Automobile 654 F2d 4, 67 (First Circuit, 1981). Davidson vs. Roadway Express, Footnote Two, 650 F2d 902, (Seventh Circuit, 1981). Mitchell, Supra, is applicable to the Union. Badon vs. General Motors Corp. 110 LRRM 2562, (Sixth Circuit, 1982). The District Court in her Opinion of October 22, 1981, after Petitioner raised the Sear case determined the Ninth Circuit Decision in Singer vs. Flying Tiger 652 F2d 1349 (Ninth Circuit, 1981) applied Mitchell to both Company and Union. See Also - The Fourth's Circuit's Decision in this case.

[2] Mitchell, Supra, is not applicable to the Union according to the District Courts in the following cases. McFarland vs. I.B.T., 535 F.Supp. 970 (ND/TEX, 1982). Collins vs. Car Haulers 536 F.Supp. 776 (ND/ILL, 1982). Bates vs. American Tara Corp., No. C-81-768A (ND/GA 1981). Simms vs. NUF Corp. No. 81-3494 (ED/PA 1982).

Mitchell does apply to the Union in the following cases: Kennard vs. United Parcel Service 531 F.Supp. 1139 (ED/MICH, 1982). Rigby vs. Roadway Express, 109 LRRM 3252 (SD/MISS, 1981). Fedor vs. Hygrade Food Products, 533 F.Supp. (ED/PA, 1982).

The failure of this Court to resolve this conflict will continue to produce extensive forum shopping, chaos, and uncertainty which is precisely what a Statute of Limitations is designed to correct in an area of law that cries out for uniformity.

It is Petitioner's contention that Mitchell, Supra, does not apply to the Union which is in accord with the position taken by the Second Circuit in Flowers, the First Circuit in Sear, and the Seventh Circuit in Davidson, and, therefore, either the State tort statute or National Labor Relations Act is the appropriate limitations period against the Union rather than the State Arbitration Statute. In fact, the AFL-CIO, in its amicus curiae, in Mitchell, Supra, suggested the six-months statute in the National Labor Relations Act was the appropriate statute applicable to both Company and Union.

Initially, it should be emphasized that the Union was not a party before this Court in Mitchell, Supra. Justice Rehnquist in Mitchell observed there was only one issue before the Court.

"We are called upon in this case to determine

which State Statute of Limitations period should be borrowed and applied to an Employee's Action Against his Employer under 301(a) Labor Management Relations Act 29 USC § 185(a) 1976 and Hines vs. Anchor Motor Freight 424 US 554 (1976 et. seq. (101 S. Ct. 1559).

The Court in Mitchell, Supra, never made a single reference to a limitations period in a fair representation suit filed solely against a union. In Vaca vs. Sipes 386 U.S. 171, 183-187 (1967) Supra, the Court unequivocally held an employee had the absolute right to file suit against either the Employer or Union. In Smart vs. Ellis Trucking Co., 580 F2d 215 (Sixth Circuit, 1978), cert. den. 440 U.S. 958 (1979), the Sixth Circuit held as the Second Circuit in Flowers and First Circuit in Sear, all agreed that the mere fact suit was timebarred against either the Company or Union did not mean it was barred against the other party.

Accordingly, this Court should grant Certiorari to resolve the conflict among the Circuits.

II. THE NATIONAL LABOR RELATIONS ACT IS THE APPROPRIATE STATUTE OF LIMITATIONS IN ALL FAIR REPRESENTATIONS SUITS

* * * * *

It is in the national interest to grant Certiorari because of the different approaches that the Federal Circuit and District Courts have taken in cases that have been decided since the Mitchell Decision and also there is a conflict among the Circuits. In Badon vs. General Motors Corp., 110 LRRM 2562, 2565, 2566 (Sixth Circuit, 1982), in adopting the National Labor Relations Act, the Court held:

> "In summary we are left without guidance by the State of Michigan with respect to the time period within which actions to vacate Labor Arbitration Awards must be brought. We must therefore decide this Federal question on the strength of our own reasoning. That process leads us to conclude that the most appropriate Statute of Limitations under these circumstances is the six-months period in the National Labor Relations Act. 29 USC § 160(b). "

In this case, Maryland has also made its arbitral statute expressly inapplicable to labor disputes (Maryland Courts and Judicial Proceedings Article 3-206(b) but the State Arbitration Statute was nevertheless selected.

In Singer vs. Flying Tiger Freight Lines 652 F2d 1349, 1352 (Ninth Circuit, 1981), the Court held:

> "In the future as Mitchell requires when the action is commenced after an unfavorable arbitral Decision, we shall treat suits against

> a Union for breach of the duty of fair representation and against the employer for breach of contract under this type of limitations period by selecting the State Arbitration Statute."

It remains unclear whether the Ninth Circuit would apply arbitral limitations to the Union and Company where the Union failed or refused to file a grievance in a Fair Representation/301 Action. Such a divergent course is evident from the holding of the Seventh Circuit in the case of Baker vs. Amsted Industries, Inc., 656 F2d 1245, 1251, (1981) in which the Court opined in Footnote Eleven:

> "It is possible, however, that much longer limitation periods will govern 301 and breach of duty suits that do not challenge the correctness of an Arbitration Award.
>
> (e.g. Where the Union has failed to pursue a grievance to arbitration)." [3]

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[3] See Also Byrne vs. Buffalo Creek Co. 536 F.Supp. 1301, 1306-1309 (WD/NY, 1982). Mebane vs. Metal Masters Food Service, No. K-80-973 (D/MD 1982). Kaufman, Chief Judge. Lake vs. Martin Marietta (MD/FLA, April 26, 1982) (81-230)

However, numerous courts have applied Mitchell to all stages of the grievance process even where a grievance never entered the arbitral process. For example, Bigbee vs. Local 142, 530 F.Supp. 402 (ND/ILL, 1982), Fields vs. Babcock & Wilcox (18 LRRM 3150) (WD/PA, 1981), Penson vs. Chrysler Corp., 109 LRRM 3359 (ND/OHIO, 1981). Cade vs. Bethlehem Steel, Civil No. JH-80-3332 (D/MD, 1982). Ross vs. Bethlehem Steel Corp., JH-81-273 (D/MD, 1981). In fact, the Supreme Court's Decision in Mitchell, Supra, to apply the State Arbitration Statute to 301 Actions involving arbitral awards has actually been subsequently rejected by six courts which adopted the Federal Arbitration Act, National Labor Relations Act, and State Tort Statute, e.g. Badon vs. GMC, 110 LRRM 2562 (Sixth Circuit, 1982), Local 120 vs. FMC Corp., 658 F2d 1285, 1291, 1292 (Ninth Circuit, 1981), Kaftanzis vs. D. L. Transportation Co., 531 F.Supp. 566 (ND/ILL, 1982), Collins vs. Car Carriers, Inc. 536 F. Supp 776 (ND/ILL, 1982), Creer vs. U. S. Postal Service, 109 LRRM 2706, (ND/ALA, 1981), Benson vs. General Motors Corp., No. 81-M-0146 (ND/ALA, 1982), the National Labor Relations

Act may be applied in other District and Circuit Courts in the future. (e.g. McQuay vs. Bethlehem Steel, 109 LRRM 2161 (D/MD, 1981). Justice Rehnquist in Mitchell, Supra, noted at 101 S.Ct. 1564, Footnote five, eight states had no time limitations in their Arbitration Statutes.[4] A District Court in one of those states in Nevils vs. McAndrew Contractors, 522 F. Supp. 526 (MD/TENN, 1981), selected the State Tort Statute. Thus, in those states having no arbitral time limitations, a Statute other than the State Arbitration Statute must be selected.

These legitimate, but nonetheless confusing interpretations frequently resulting in strikingly different results is graphically illustrated by the concluding observation of District Judge Bua in Collins vs. Car Carriers, Inc., 536 F.Supp. 776, 780, who selected the

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[4] Iowa recently passed a State Arbitration Statute. The other seven states are Kentucky, Tennessee, West Virginia, Virginia, Montana, North Dakota, and Nebraska.

six-months statute of the National Labor Relations Act and Opined:

> "This Court is of the opinion that this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate determination of this litigation."

Moreover, many of the 43 states which do have arbitration laws and procedures governing the vacation of Arbitration Awards are by these terms expressly inapplicable to labor disputes.[5]

Although the Mitchell selection of the State Arbitration Statutes was designed to enhance the policy of rapid resolution of labor disputes, many of the state arbitral statutes were enacted prior to this Court's

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[5] See Badon vs. General Motors Corp., 110 LRRM 2562, 2565 (Sixth Circuit, 1982). South Carolina 15.3.530 (1980 Edition). See Also - Alaska State Statutes 09.43.010. Arkansas Statutes Ann. 34-511, Idaho Statutes 7-901. Louisiana 9:4201. Maryland, Courts and Judicial Proceedings, Article 3-206(b). Michigan, Chapter Fifty G.C.R. 769.9(2). Texas Rev. Civ. Stat. Ann. Title Ten, Art. 224. Washington Rev. Code Ann. 7.04.010

formulation of the fair representation doctrine in 1944. It is therefore, apparent that many states enacted their arbitral statutes without considering the policy questions unique to labor disputes or national goals addressed by the Labor Management Relations Act of 1947. [6]

Thus, it presently appears in some jurisdictions that a two-tiered system of limitation periods have developed based upon whether a union improperly processes a grievance to the end of the arbitral trail in which event arbitral limitations applies. In other cases, where the union either refuses to initiate or withdraws a grievance from arbitration, the Contract or Tort Statute are selected which does violence to the policy in Mitchell, Supra, that the grievance and arbitral process not be suspended in limbo for long periods.

Finally, every litigant in a fair representation/301 suit is bound by the burden of proof imposed by Hines vs. Anchor Motor Freight, Inc., 424 U.S. 554 (1976)

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[6] See Alabama, Title Seven, Section 829, 843 (1940). New Hampshire Chapter 138 § 1 P. 430 (1945). Washington State Enacted Laws of 1943. West Virginia (108 § 1 (1923). Tennessee Code 1932, 9359.

Consequently, when a litigant initiates suit against a union and company separately or together, the question of which limitation period applies frequently depends upon such fortitious factors as the forum, and very often the whimsical interpretations of the Court concerning the appropriate period of limitations.

Ironically, the continuing selection of State Contract and Tort Statutes which were expressly rejected in Mitchell, Supra, demonstrates the need for further clarification by this Court to eliminate the chaos and confusion that these decisions portend.

Petitioner respectfully contends that this Court's dual policies in labor relations disputes which encourages uniform national policies [7] and relatively rapid disposition of labor disputes [8] necessitates adoption of the six-months

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[7] Teamsters Local vs. Lucas Flour 369 U.S. 95 (1962) Textile Workers vs. Lincoln Mills 353 U.S. 348 (1957).

[8] Auto Workers vs. Hoosier Cardinal 383 U.S. 696 (1966): United Parcel Service vs. Mitchell, 451 U.S. 60 (1981).

limitation period in the National Labor Relations Act in 301 suits.

At various times, a majority of justices who decided Mitchell, Supra, favored a uniform federal statute for all 301 Actions (e.g., White J. Brennan, J. (Auto Workers vs. Hoosier Cardinal 383 U.S. 709 et. seq.). Some preferred the National Labor Relations Act in a 301 fair representation Action filed against an employer. (Stewart J. Blackmun, J.) United Parcel Service vs. Mitchell 451 U.S. 60 (1981)) and one justice urged the selection of the National Labor Relations Act against a union in a 301 fair representation Suit. (Stevens, J. United Parcel Service vs. Mitchell, 451 U.S. 68 (1981)).

Furthermore, the majority of justices in Mitchell, did not reject the application of the six-months limitation period in the National Labor Relations Act but simply stated that the issue was not before them. 101 S.Ct. 1562, 1563.

The primary reason why the National Labor Relations Act should be selected is that it represents the closest analogous Statute of Limitations which would uniformly apply to all unfair representation/301 Cases in every jurisdiction as long as the labor contract requires arbitration.

Nice questions, such as the unions' refusal to initiate or take a grievance to arbitration, the forum of the litigation, the failure of a State to have a time limitation in its arbitral statute or be expressly inapplicable to labor disputes or deciding the conflicts of law question when an arbitration is performed outside the jurisdiction of the forum state hearing the case (see Bigbee vs. Local 142 530 F.Supp. 402, 404, 405 (ND/ILL, 1982) would no longer govern the selection process and irrationally short time periods, such as ten days, twenty days, and thirty days in some states (see Appendix A) and as long as ten years in other states would be eliminated. The distinction drawn by the Second Circuit

in Flowers, the First Circuit in Sear and Seventh Circuit in Davidson between suits against the Union and Company would be abolished thereby guaranteeing the certainty which truly promotes the rapid resolution of labor disputes.

The best argument in support of a uniform national statute is cogently expressed by Justice Stewart in two labor cases Occidental Life Insurance Co. vs. EEOC 432 U.S. 355, 367 (1977) and in the concurring Opinion in United Parcel Service vs. Mitchell 101 S. Ct. 1566 (1981).

In United Parcel Service vs. Mitchell at 101 S.Ct. 1565, Justice Stewart concluded in adopting the National Labor Relations Act as the appropriate statute of limitations that a fair representation suit did involve:

> "Those consensual processes that Federal Labor Law is chiefly designed to promote--the formation of the agreement and private settlement of disputes under it."
> cf. Auto Workers vs. Hoosier Cardinal 383 U.S. 696, 702

> "The case before us is quite unlike the one in Hoosier. It is a hybrid § 301 and breach of duty suit," Vaca vs. Sipes 386 U.S. 171, 197 n. 18 87 S.Ct. 903, 920 n. 18, 17 LED 2d 842 brought by an employee against his employer

> and his union in order to set aside a "final and binding" determination of a grievance, arrived at through the collectively bargained method of resolving the grievance. IT IS THEREFORE A DIRECT CHALLENGE TO THE PRIVATE SETTLEMENT OF DISPUTES UNDER [THE COLLECTIVE BARGAINING AGREEMENT]."

The Court, in another labor dispute in Occidental Life Insurance Co. vs. EEOC 432 U.S. 355, 367 (1977) held:

> "This Court has not mechanically applied a State Statute of Limitations simply because a limitations period is absent from a federal statute. State legislatures do not devise their limitation periods with national interests in mind, and it is the duty of Federal Courts to assure that the importation of state law will not interfere or frustrate the implementation of national policies. State limitation periods will not be borrowed if their application would be inconsistent with the underlying policies of the Federal Statute."

This approach finds support in the proposition that a breach of duty of fair representation is also an unfair labor practice to which the procedures of the National Labor Relations Act apply. See Ford Motor Co. vs. Huffman 345 U.S. 330, 338 (1953). Sayre vs. Oil Workers 350 U.S. 892 (1955).

Humphrey vs. Moore 375 U.S. 335, 342 (1964). Vaca vs. Sipes 386 U.S . 171, 182 (1967) and Electrical Workers vs. Foust 442 U.S. 42, 46 Note 8 (1978). Therefore, the National Labor Relations Act's limitations should apply.

In Hines vs. Anchor Motor Freight 424 U.S. 554 (1976), this Court held it was an indispensable predicate for a litigant to prove a breach of duty of fair representation to prevail.

Accordingly, this Court should grant the Petition for the Writ of Certiorari on this ground as well.

III. THIS COURT'S DECISION IN UNITED PARCEL SERVICE vs. MITCHELL SHOULD BE APPLIED PROSPECTIVELY

* * * *

There is a direct conflict between the Fourth Circuit's Decision in this case (See Apprendix B, P. 1 and 2) and the Ninth Circuit Court of Appeals in Singer vs. Flying Tiger 652 F2d 1349, 1352 (1981) over whether Mitchell, Supra, should be applied in a propsective or retrospective

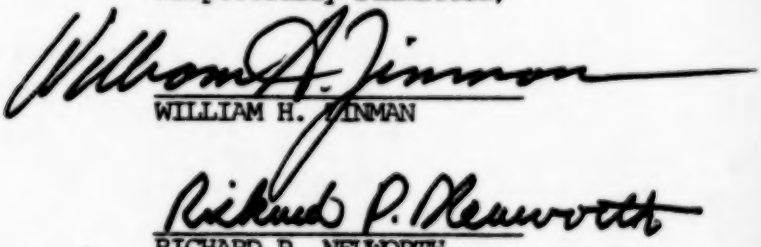
fashion to suits filed in 1978. This Court's latest pronouncement in Chevron Oil Co. vs. Huson 397 U.S. 404 (1971) held such limitation decisions should be applied prospectively.

CONCLUSION

* * *

For all of the above reasons, the Petition for the Writ of Certiorari should be granted.

Respectfully Submitted,



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APPENDIX A

STATE STATUTES OF LIMITATIONS

STATE STATUTES OF LIMITATIONS GOVERNING ACTIONS TO VACATE ARBITRATION AWARDS.

Alabama Code 6-6-15 (10 days)

Ariz. Rev. Stat. Ann. § 12-1506 (10 days)

Conn. Gen. Stat. Ann. § 52-420 (West) (30 days).

Hawaii Rev. Stat. § 658-11 (10 days)

Md. Stat. Ann. CJ § 3-224 (30 days)

Mass. Gen. Laws Ann. Ch. 150c § 11 (30 days)

Mich. Gen. Court Rules 769 (20 days)

Ore. Rev. Stat. § 33.310 (20 days)

Vt. Stat. Ann. tit. 21 § 541 (30 days).

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PHILIP DELCOSTELLO,

Appellant,

Vs.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS AND WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendant,

AND

LOCAL 577, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMENT AND HELPERS OF AMERICA, AND ANCHOR MOTOR FREIGHT, INC.,

Appellees.

NO. 81-2086

UNPUBLISHED

Appeal from the United States District Court for the District of Maryland at Baltimore. Shirley B. Jones, District Judge.

Argued March 30, 1982
Decided April 19, 1982

Before: WINTER, Chief Judge
BRYAN, Senior Circuit Judge
and HALL, Circuit Judge

PER CURIAM:

After plaintiff unsuccessfully submitted his claim for wrongful discharge to binding arbitration under a

collective bargaining agreement, he sued his former employer, alleging wrongful discharge in breach of contract, and his union, alleging breach of the duty of fair representation. The arbitrators' award in favor of the employer was made on July 18, 1977, and plaintiff received a copy several days later. Suit was not instituted until March 16, 1978.

Relying upon United Parcel Service vs. Mitchell, 451 U.S. 56 (1981), the district court dismissed the suit and ruled that it was barred as to both the employer and the union by the thirty-day limitations period contained in Md. Code Ann., Cts. and Jud. Proc. § 3-224 (Repl. Vol. 1980).

We think that the district court was correct in its conclusion, and we affirm on the basis of its memorandum and order. See Delcostello v. International Brotherhood of Teamsters, Chauffeurs and Warehousemen and Helpers of America, Civil Action No. J-78-436 (D.Md., Oct. 22, 1981).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PHILIP DELCOSTELLO

Plaintiff)

Vs.) CIVIL ACTION NO. J-78-436

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL.)

Defendants)

MEMORANDUM AND ORDER

Plaintiff instituted this action under the Labor Management Relations Act, 29 USC § 185, against his employer, Anchor Motor Freight, Inc., for his allegedly wrongful discharge on June 27, 1977, and against Local 557, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereafter referred to as the Local) and the International Brotherhood of Teamsters (hereafter referred to as the International) for breach of the duty of fair representation in connection with the grievance arbitration proceeding. The action arose out of an incident that occurred on June 27, 1977. Plaintiff reported for work and was assigned a tractor-trailer to use in

transporting a load of new automobiles from Baltimore to Montreal, Canada and a return trip with another load to Washington, D.C. Plaintiff inspected the truck and reported several conditions he thought needed repair to the maintenance shop foreman. Some repairs were made, and the plaintiff was later told that the truck was ready. Plaintiff contended that all the items he had noted as needing repair were not performed, that driving the truck in its condition then would be dangerous, and refused to drive the truck. The company contended that all necessary repairs had been made and the truck was safe to drive. Plaintiff's continued refusal to drive the truck resulted in his termination. 1/

Plaintiff contacted Arthur C. Morningstar, business agent for the Local. Unresolved at the local level, the matter was heard on July 10, 1977 by the Eastern Conference Automobile Transporters Joint Committee in a formal grievance proceeding. The Eastern Conference panel ruled in favor of the employer. Plaintiff alleges that he was inadequately represented by the Union at that proceeding. Suit was filed in this Court on March 26, 1978.

1/ Plaintiff contends that he was fired; the company contends that his refusal to drive the truck, upon being directed to do so, was regarded as a voluntary quit.

All three defendants filed motions for summary judgment. The International's motion was never answered by plaintiff. Plaintiff responded to the motions of the Local and Anchor Motor Freight, and oral argument before this Court was held March 6, 1981. The International's motion for summary judgment was granted in an oral ruling at the hearing, and its request for attorneys'fees and costs was denied. Ruling on the motions of the employer and the Local was deferred at the hearing, and this opinion now addresses those motions.

Some of the same grounds for summary judgment are asserted by the Local and the Employer, and the common grounds are treated together.

1. Failure to exhaust intraunion rememdies.

The Teamsters constitution, Art. XIX § 12(a) requires that "every member...against whom adverse rulings or decisions have been rendered or who claims to be aggrieved, shall be obliged to exhaust all remedies provided for in this Constitution and by the International Union before resorting to any Court..." Article XIX, §1, sets up procedures by which members may prefer charges against another member or any officer, with trial by the Local's Executive Board. If disciplinary action is taken against the member, he may appeal

to the Joint Council. Plaintiff admittedly exhausted the contractual grievance remedy for his discharge but did not initiate any of the proceedings provided for in the Teamsters constitution for charges or grievances brought against union members and officers.

The Fourth Circuit has applied the exhaustion of intraunion remedies doctrine in cases involving claims under Labor Management Reporting and Disclosure Act (LMRDA), but no published opinions have applied it in suits such as this, under the Labor Management Relations Act (LMRA). Courts of appeals in other circuits have, however, applied the exhaustion doctrine to actions brought under § 301 of the LMRA. Fristoe v. Reynolds Metals Co., 615 F.2d 1209, 1214 (9th Cir. 1980); Winter v. Local Union No. 639, 569 F2d 146 (D.C. Cir. 1977); Newgate v. Modine Mgf. Co., 495 F2d 919 (7th Cir. 1974); Imel v. Zohn Mfg. Co., 481 F2d 181 (10th Cir. 1973); Brady v. Transworld Airlines, Inc., 401 F2d 87 (3d Cir. 1968), cert. denied, 393 U.S. 1048 (1969); Bsharah v. Eltra Corp., 394 F2d 502, 503 (6th Cir. 1968) (per curiam) (alternate holding). At least two judges of this district have also done so. Fabian v. Freight Drivers & Helpers Local No. 557, 448 F.Supp. 835, 839 (D.Md. 1978) (Young, J.); Murray v. Branch Motor Express Co., Civ. No. HM-78-1717 (D.Md., July 31, 1979), aff'd

No. 79-1485 (4th Cir. 1980. But see Fox v. Mitchell Transport, Inc., Civ. No. Y-80-1596 (D.Md. Feb. 3, 1981) (Young, J.).

Exhaustion of internal remedies may be excused in a number of instances. The Fourth Circuit recently summarized the exceptions recognized in LMRDA actions. Exhaustion is excused when a disciplinary action taken against a member was illegal or "void" or where, for any reason, the remedy would be inadequate, illusory or futile. Keeffe Bros. v. Teamsters Local Union No. 592, 562 F2d 298 (4th Cir. 1977). The latter exception is relevant to suits under the LMRA, e.g., Winter v. Local Union No. 639, 569 F2d 146 (D.C. Cir. 1977), and it has been said to apply where the internal procedures afforded clearly provide no way to obtain the relief requested, see id. at 149, or where union hostility is shown, id. The hostility involved would be that of the union officials who hear the complaint.

The many cases in this area, only a few of which have been cited here, are conflicting, and factual distinctions alone cannot account for the different results. It appears that the Supreme Court will resolve the issue this term, certiorari having been granted in Clayton v. ITT Gilfillan, 49 USLW 3332 (U.S. Nov. 3, 1980. That, of course, does not relieve this Court of its responsibility to decide the matter now.

The appropriate approach, however, is to examine each case in light of the purpose of the exhaustion requirement, which is to afford the union an opportunity to correct its own wrongs or problems before suit. E.g., Wiglesworth v. Teamsters Local No. 592, 552 F2d 1027 (4th Cir. 1976). Given that purpose, the first inquiry is whether the wrong complained of is one that relates to internal union affairs. Cases arising under the LMRDA are, by definition, such matters, and some cases brought under the LMRA may also be of such a nature. The second major inquiry is whether the internal procedures are sufficient to enable the union member to secure relief. This approach was taken by the Court of Appeals for the District of Columbia in two recent cases involving the remedies at issue here under the Teamsters constitution. Chambers v. Local Union No. 539, 578 F2d 375 (D.C. Cir. 1978); Winter v. Local Union No. 639, 569 F2d 146 (D.C. Cir. 1977). In the Winter case the plaintiff asserted a breach of the duty of fair representation by the Union's failure to process a grievance; in the Chambers case, the breach alleged related to the union's conduct following arbitration of a seniority grievance, including its representation at a second grievance hearing. The District of Columbia Court of Appeals affirmed a dismissal for failure to exhaust in the

Winter case. It noted, as to the Union, that although money damages would not have been available, the disciplinary sanctions could have provided the equivalent of injunctive relief sought. 569 F2d at 149. In Chambers, the facts of which admittedly involved a more serious breach than is alleged here, the Court pointed to the facts that the case related to the employment relation, not a merely internal matter, and that the union proceedings could not produce the remedies of assignment of work by the employer and damages. 578 F2d at 387. A significant factor in Chambers was the union's bias and conflict of interest, id. at 388. The Seventh Circuit has, however, reached a similar conclusion in Miller v. Gateway Transp. Co., 616 F2d 272 (7th Circ. 1980). The Court of Appeals reversed summary judgment in favor of the employer on the exhaustion ground. Assuming that the defense was available to an employer,[2/] it noted that the union remedies available to its members did not include setting aside a grievance award or other relief from the employer. Id. at 275. This Court finds persuasive the

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[2/] Courts have differed on the question when and whether an employer, as well as a union, may raise failure to exhaust intraunion remedies. Compare, e.g., Geddes v. Chrysler Corp., 608 F2d 261 (6th Cir. 1979) with Harrison v. Chrysler Corp., 558 F2d 1273, 1278-79 (7th Cir. 1977). It is not necessary here to reach the question.

the reasoning of those courts that have held the remedies available through the Teamsters constitution to be inadequate to afford relief where the plaintiff asserts a claim against his employer for breach of the collective bargaining agreement and against the union for breach of its duty of fair representation by representation at a prior grievance proceeding. Miller v. Gateway Transp. Co. 616 F2d 272 (7th Cir. 1980); Chambers v. Local Union No. 539, 578 F2d 373 (D.C. Cir. 1978); see Winter v. Local Union 539, 569 F2d 146, 150-51 n. 26 (D.C. Cir. 1977). This decision does not conflict with cases in which the Fourth Circuit has apparently sanctioned the Teamsters procedures for prosecution of claims involving internal affairs.

2. Limitations

The Local and the Employer assert that plaintiff's action is barred by limitations. The decision of the Joint Council was an arbitration proceeding; therefore, the appropriate time for filing suit was within the Maryland period for vacation of an arbitration award, 30 days, Md. R.P. E4; Md. Cts. & Jud. Proc. Code Ann. § 3-224, or 90 days.

As the Local has pointed out, this Court recently decided that the appropriate statute of limitations to be applied to an action for the union's breach of the duty of fair representation is the three-year statute of limitations,

on the basis that such a suit cannot be equated with an action to vacate an arbitration award. This Court continues to find the reasoning of the Second Circuit in Mitchell v. United Parcel Service, 624 F2d 393 (2d Cir. 1980), cert. granted, 49 USLW 3270 (Oct. 14, 1980); more persuasive than that of the Third Circuit in Liotta v. National Forge Co., 105 LRRM 2636 (3rd Cir. 1980) with respect to both the union and the employer.

The Supreme Court will apparently decide this question soon, certiorari having been granted and argument heard in Mitchell the week of February 23, 1981.

The employer also makes the argument that suit should be barred for untimeliness on equitable grounds, arguing that had it known plaintiff was "disavowing" the union's representation it could have avoided the expense of preparing the case for arbitration or, if notified shortly after the proceeding, could have moved to vacate the arbitration award. Plaintiff certainly could not "disavow" the union as a representative in bringing its grievance. The latter alternative formulation is simply the limitations argument in another guise. If plaintiff has no obligation to bring his action within the time for vacating arbitration award, he has no obligation to advise his employer he is dis-

satisfied with the union's representation within the same period.

3. Punitive damages

The Local is entitled to summary judgment on the issue of punitive damages. The Supreme Court has held that punitive damages cannot be assessed against a union that breaches its duty of fair representation by failure to properly pursue a grievance. International Brotherhood of Elec. Workers v. Foust, 442 U.S. 42, 52 (1979). Its rationale, that depletion of a union treasury through a punitive damage award could impair its effectiveness as a collective bargaining agent, id. at 50-51, is equally applicable to a breach by failure to represent a member properly in connection with a grievance.

The Employer is likewise entitled to summary judgment on the issue of punitive damages, but for a different reason. Plaintiff asserts that the employer breached the collective bargaining agreement by discharging him; he also alleges a conspiracy between his employer and the unions to remove him from his job. Although there might be instances in which an employee could recover punitive damages for a discharge, the facts properly before this Court on motion for summary judgment do not create any factual issues as to

malicious or other egregious conduct on the part of the employer.

Although summary judgment could not be granted if the undisputed facts were subject to inferences favorable to plaintiff, the fact of termination alone, without more, does not give rise to such an inference. The Employer has submitted affidavits establishing that certain repairs were performed on the tractor-trailer plaintiff refused to drive and that the rig was thereafter driven by Curtis Aiken to Canada and back without malfunction. Although the affidavits do not preclude a finding that plaintiff might nonetheless have been justified in refusing to drive the truck, plaintiff has not presented any factual materials to support his contentions regarding his prior complaints, his conversation with mechanics, and other facts upon which he relies. Plaintiff relies on facts previously stated in his deposition and apparently on some statements in the deposition of James Gasper. No depositions have been filed in this case, and thus the Court cannot assume any facts asserted in them. There is no requirement of filing depositions under the federal rules, but if they are relied upon, they must be before the Court. The purpose of a motion for summary judgment is to require that

allegations be tested in light of specific facts. See 10 C. Wright & A. Miller, Federal Practice and Procedure § 2739. The moving party bears the burden of demonstrating that the factual material upon which it relies entitles it to summary judgment, id., e.g., Addicks v. S.H. Kress & Co., 397 U.S. 144 (1970), but a party who fails to come forward with proper factual material takes a risk that the evidence before the Court will be sufficient to sustain that burden.

In addition to the absence of facts supporting malice or something similar in the circumstances of the termination, there are no facts to support a finding of conspiracy between the Employer and the Local.

4. The Employer

The Employer asserts that the arbitration proceeding on plaintiff's termination grievance is conclusive. This, of course, is true, but Hines v. Anchor Motor Freight Service, 424 U.S. 554 (1976), establishes that a prior arbitration is no bar to suit against the Employer where the union's breach of duty of fair representation has tainted the arbitration process. The Employer also asserts that it is entitled to summary judgment

on that issue . On the facts before this Court, summary judgment cannot be granted.

A union breaches its duty of fair representation when its conduct is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 368 U.S. 171, 190 (1967). Something more than negligence must be present, and a union may exercise discretion in representing employees, Wyatt v. Interstate & Ocean Transport Co., 623 F2d 888, 891 (4th Cir. 1980). In applying the Vaca standard, the Fourth Circuit has held that a union's conduct must meet three standards and that a breach of one may constitute a basis for a cause of action. The union must treat all segments of its membership without hostility or discrimination, must exercise its admittedly broad discretion in "complete good faith and honesty," and must avoid arbitrary conduct. Id. at 890-91 (quoting Griffin v. International Union, United Automobile A. & A.I.W., 469 F2d 181, 183 (4th Cir. 1972)).

In this circuit, neither actual ill will nor intentional conduct is necessary to find a breach. Wyatt v. Interstate & Ocean Transport, 623 F2d at 891. The "arbitrary" conduct referred to in Vaca may consist of gross indifference or deficiency in a duty. Id.

Failure to investigate a grievance, for example, as plaintiff asserts, may constitute arbitrary conduct. DeArroyo v. Sindicate de Trabajous Packing, 425 F2d 281 (1st Cir. 1970); see Hines v. Anchor Motor Freight Service, 424 U.S. 554 (1976). The factual material submitted by the Employer does not establish that there are no disputes of material facts entitling it to summary judgment as a matter of law. As noted before, the depositions are not on file in this case. The Employer submitted some pages of the plaintiff's deposition relating to the grievance hearing. Although plaintiff has not properly controverted these materials, even if consideration of those excerpts is proper, they fail to establish that defendant is entitled to judgment as a matter of law.

Summary judgment on the issue of punitive damges will be entered in favor of the Local and the Employer, and otherwise will be denied.

/S/ SHIRLEY B. JONES
United States District Judge

Dated: March 17, 1981

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PHILIP DELCOSTELLO,

Plaintiff

Vs.) CIVIL ACTION NO. J-78-436

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMENT AND HELPERS OF AMERICA, ET AL.)

Defendants)

MEMORANDUM AND ORDER

This action was brought under § 301 of the Labor Management Relations Act against plaintiff's employer, Anchor Motor Freight, Inc., for wrongful termination and against Teamsters International and Local 557 for breach of the duty of fair representation. The incident that resulted in plaintiff's termination occurred on June 27, 1977, and a grievance against the employer was heard by the Eastern Conference Automobile Transporters Joint Committee on July 19, 1977, which decided in favor of the employer. Plaintiff received a copy of the arbitration decision "several days later." On August 20, 1977, he received a copy of the minutes of the July 1977 meeting from Arthur C. Morningstar, with a letter asking that he forward

any changes, in writing, or the minutes would be approved. Plaintiff consulted with an attorney and, on September 14, 1977, wrote the president of Local 557 expressing his dissatisfaction with the decision and the union's representation of him. Suit was filed on March 16, 1978.

This Court ruled on defendants' motions for summary judgment on March 17, 1981. The argument that this action was barred by the Maryland 30-day limitations period for vacating arbitration awards was rejected, and the three-year limitations period was applied. The Supreme Court decided United Parcel Serv., Inc., v. Mitchell, 101 S. Ct. 1559 (1981), on April 20, 1981. It held that New York's 90-day limitations period of vacating an arbitration award was the analogous state statute to be applied in a § 301 action against an employer where an arbitration award had been entered in favor of the employer. Local 557 and Anchor Motor Freight filed a joint motion for reconsideration of the prior ruling on limitations in light of Mitchell. Plaintiff has responded, and the parties have briefed the issue extensively. No oral argument is deemed necessary. See Local Rule 6.

The primary question presented is whether Mitchell

should be applied retroactively. There is no question that, if it can be applied retroactively, Mitchell governs. Although only the employer was before the Court, it is reasonably clear from the Supreme Court's opinion that the short limitations period would apply to a companion action against a union for breach of the duty of fair representation. See Singer v. Flying Tiger Line, Inc., 652 F2d 1349, 1353 (9th Cir. 1981). But see Sear v. Cadillac Automobile Co., 654 F2d 4, 6-7 (1st Cir. 1981) (dictum).

Exactly when the plaintiff received the Eastern Conference decision is not clear; plaintiff states that it was "several days" after the July 19, 1977 meeting. Plaintiff had the decision at some point before he received Mr. Morningstar's letter on August 20, 1977.

Plaintiff urges that his September 14, 1977 letter should be treated as a request for reconsideration of the arbitration decision, tolling the statute of limitations until he received a response. No formal response was ever made by the Eastern Conference or Local 557, but plaintiff was aware no later than December 1977 that nothing more would be done by the Local and the Eastern Conference. [1/]

[1/] See Plaintiff's Affidavit of May 26, 1981, ¶ 6.

Even assuming that limitations did not begin to run until plaintiff was told that no further action would be taken, in late December, 1977, this action was filed more than 30 days after that time. Cf. Davidson v. Roadway Express, Inc., 650 F2d 902, 904 (7th Cir. 1981) (even assuming attempts to reopen arbitration tolled statute, claim barred).

The Supreme Court summarized the factors to be considered in deciding whether a new decision should be applied retroactively in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). Huson, a Chevron employee, had sued, under the Outer Continental Shelf Lands Act, for injuries sustained on a drilling rig off the coast of Louisiana. Before and at the time of suit, federal courts had applied general admiralty law, including its laches doctrine of timeliness, to suits for injuries under the Outer Continental Shelf Lands Act. While Huson's case was still in the discovery stage, the Supreme Court held in Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969), that the Act should not be read as making admiralty law applicable to suits for personal injuries under the Act. The district court accordingly held that Huson's action was time barred under a one-year state statute of limitations, but the Fifth Circuit

reversed. The Supreme Court held that the state one-year statute was the appropriate limitations period but also held that the decision would not be applied retroactively.

The Court identified three factors to be used in deciding whether to apply a decision nonretroactively. First, the decision sought to be applied only prospectively must establish a new legal principle, either by overruling "clear past precedent" or by deciding a case of first impression, resolution of which "was not clearly foreshadowed" in earlier cases. Id. at 106. The prior history, purpose and effect of the rule are to be weighed, to determine whether retroactive application furthers or retards its operation. Id. at 106-07. Finally, retroactive operation must be weighed to see whether substantial injustice or hardship is caused. Id. at 107.

The three factors are interrelated. The first and third factors combined, for example, require analysis of a "reliance factor." Cash v. Califano, 621 F2d 62, 629 (4th Cir. 1980). As the U. S. Court of Appeals for the Fourth Circuit recently stated, "absent some surprise engendered by a current judicial interpretation, a litigant cannot be heard to demand nonretroactivity on the basis of inequity." Id. Retroactive application is the norm, and

the party urging nonretroactivity bears the burden of establishing sufficient equitable reasons to overcome the norm. Id.

Past precedent in the Supreme Court and the Fourth Circuit on the issue decided in Mitchell cannot be described as "clear." The Supreme Court held in UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966), that the timeliness of a § 301 action is to be determined by reference to the appropriate state statute of limitations. Id.at 704-05. The case was an action on behalf of an individual employee against his employer; the question was whether the limitations period for actions based exclusively on written contracts or for those based on oral contracts should be applied. There was a written collective bargaining agreement and an oral employment contract between the employee and the employer. Noting that the characterization of the action was matter of federal law, the Court stated that there was no reason to reject a state law characterization unless it was unreasonable or inconsistent with national labor policy. Id. at 706. The Court held that the state law characterization of the action as one not based exclusively on a written contract was acceptable and not in conflict with labor policy. Id. at 706-07. Prior

arbitration was not an issue in the case.

There was no prior case of the U. S. Court of Appeals for the Fourth Circuit addressing the question decided in Mitchell. The Court held in Kennedy v. Wheeling Pittsburgh Steel Corp. 81 LRRM 2349 (4th Cir. 1973) (per curiam), an unpublished opinion, that a § 301 action against a union was barred by a state's five-year statute of limitations on suits on oral contracts, reasoning that the same limitations period should apply to a suit against the union as applied to that against the employer. The question whether a statute of limitations for vacating arbitration awards barred suit was not before the Court, although the union had argued that the six-month limitations period of the Labor Management Relations Act or the state limitations period for tort actions applied, see id. at 2349.

The limitations question in Mitchell had not been previously presented to the Supreme Court. The case is not, however, one of first impression in the same sense as Rodrique v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969), the decision with which Chevron Oil dealt was. Hoosier Cardinal has established some general principles, and Mitchell applied them. Admittedly, more than a routine

application was involved. The relatively rare instances. in which courts have applied decisions prospectively in the civil area have usually involved a " 'clear break with the past,' " Ramey v. Harber, 589 F2d 753, 758 (4th Cir. 1978) (quoting Desist v. United States , 394 U.S. 244, 248 (1969)), and often the "past" is long and well established, e.g., id. Here there was no such "past." Although it was reasonable for plaintiff or his attorney to read Hoosier Cardinal and cases in other jurisdictions, in the absence of clear authority otherwise, as allowing a limitations period of three years, the burden cast upon a litigant urging nonretroactivity has not been met with respect to the essential element for prospective application. That burden casts, in an unclear or developing area of the law, even his well-informed or reasonable belief, upon the plaintiff here. Because plaintiff cannot meet the Chevron Oil test with respect to that element, it is unnecessary to consider other factors. See Cash v. Califano, 621 F2d at 629.

A few other courts have been faced with the problem of retroactive application of Mitchell, although none of the cases reported to date is extremely helpful. The

U. S. Courts of Appeals for the First and Seventh Circuits have applied Mitchell retroactively, although neither court analyzed the question in terms of the Chevron Oil factors. Sear v. Cadillac Automobile Co., 654 F2d 4 (1st Cir. 1981); Davidson v. Roadway Express, Inc., 650 F2d 902 (7th Cir. 1981). In Sear the Court discussed Mitchell, apparently assuming retroactivity, but held that Mitchell only applied to a suit against an employer, not to a suit against a union for breach of the duty of fair representation. 654 F2d at 6-7. The Seventh Circuit following Mitchell without discussing retroactivity. See also Scott v. Chrysler Corp., 107 LRRM 308 (ED/MICH, 1981).

The only case in which retroactivity is discussed is Singer v. Flying Tiger Line, Inc., 654 F2d 1349 (9th Cir. 1981). The Court noted "a critical factor is that the rule of the Mitchell case is not one which might have been anticipated." Id. at 1353. It declined to apply Mitchell retroactively. Singer is not completely apposite. Mitchell was decided after the district court decision had been appealed but before oral argument. The union and employer had not urged below that the state limitations period for vacation of arbitration awards applied, and the

Ninth Circuit noted that normally grounds not raised below are not considered on appeal. Id.

As previously mentioned, my reading of Mitchell is that where the breach of the duty of fair representation complained of relates to the union's presentation of the employee's grievance at an arbitration hearing resolved in favor of the employer, the same limitations period will be applied to the action against the union as to the underlying action against the employer. Joint presentation and trial of the two claims is virtually compelled by the nature of the concomitant actions against the employer and union in § 301 cases. Plaintiff must now bring suit against the employer within the period of time for vacating the arbitration award in any event and is not substantially burdened by having to sue the union at the same time.

Plaintiff has asserted that the Maryland 30-day limitations period for vacating arbitration awards is unconstitutional, at least as applied to this action or to § 301 actions generally. The Maryland statute, Cts. & Jud. Proc. Code Ann. § 3-224, provides that a petition to vacate an arbitration award is to be filed within 30 days after delivery of a copy of the award to the petitioner, id. § 3-224(a)(1), and specifies five grounds

upon which an award is to be vacated, id. § 3-224(b). One of the grounds is that an award as "procured by corruption, fraud, or other undue means," id. § 3-224(b)(1), and where that is the ground for the petition to vacate, the period of limitations begins when the ground became known, or should have become known, to the petitioner, id. § 3-224(a)(2).

Plaintiff relies in part on the general principle that when a new limitations period is applied to existing causes of action a reasonable time period must be allowed for assertion of existing rights. That principle is applied to statutory enactments. The principles concerning retroactive application of decisions implicate similar concerns, but, as previously noted, they do not dictate nonretroactive application of Mitchell.

Plaintiff also contends that a 30-day period is simply too short a time to be applied to a § 301 action. He points out that although 30-day time periods are common for filing appeals from trial court or administrative decisions, normally counsel has already been retained and is familiar with the facts of the case, so that filing an appeal is a relatively short process. This is not true of a § 301 suit. Employees are forbidden from being

represented by counsel at a labor arbitration proceeding, rather they must be presented by the union. It is not necessarily true that individuals are generally represented by counsel at administrative proceedings, although they may be, if they wish. The 30-day limitations period, Md.R.P. B4, for seeking judicial review of an administrative determination will be applied whether a petitioner was represented by counsel or not.

As previously noted, it may well be that plaintiff's tolling arguments have merit, and I have here assumed, for the purpose of deciding the motion, that the limitations period began in December, 1977. In considering plaintiff's argument that 30 days, as opposed to the 90-day period in Mitchell, is too short a time, it is important to note the scope of Mitchell. This Court does not read that case as broadly as does the plaintiff. Mitchell involved an allegation that the union had breached its duty of fair representation by the manner in which it handled the grievance. See Mitchell v. United Parcel Serv., Inc. 624 F2d 394, 396 (2d Cir. 1980), rev'd, 101 S. Ct. 1559 (1981). That was the allegation in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), upon which the Mitchell

court relied in its characterization of the action as analogous to an action to vacate an arbitration award. The kind of conduct typically alleged, as here, is a union's failure to investigate the facts of the grievance or to present the employee's case properly at the hearing. This conduct will generally be known to the employee at the arbitration hearing. I do not read Mitchell as precluding, in the proper circumstances, the application of a "saving" provision such as is contained in § 3-224(a)(2), where fraud, coercion or the like is involved. Although other states have chosen to enact limitations periods for challenging arbitration awards greater than 30 days, see Mitchell, 101 S. Ct. at 1563 n. 5, 30 days is not unconstitutional, either inherently or as applied by a federal court to a § 301 action.

For the reasons set forth in this Memorandum, I shall vacate the prior ruling on the motions for summary judgment of Local 557 and Anchor Motor Freight and, based on Mitchell, enter summary judgment for both defendants on the ground that plaintiff's action is barred by limitations.

Defendants have requested, in addition to summary

judgment in their favor, that this Court award them costs and attorneys' fees. No supporting documents have been submitted. More important, although defendants have ultimately prevailed, the fact that they did so only after the subsequent ruling of the Supreme Court amply demonstrates that this is the kind of case in which an award of costs and attorney's fees is inappropriate.

/S/ SHIRLEY B. JONES
United States District Judge

Dated: October 22, 1981